

**Letter of Findings: 09-0192  
Sales and Use Tax  
For the Tax Years 2005-2007**

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**ISSUES**

**I. Sales and Use Tax—Imposition.**

**Authority:** IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-18; IC § 6-8.1-5-1; [45 IAC 2.2-5-28](#); [45 IAC 2.2-5-36](#).

Taxpayer protests the imposition of use tax on its purchase of "surgical supplies."

**II. Tax Administration—Offset of Assessment.**

**Authority:** IC § 6-8.1-9-1; IC § 6-8.1-9-2.

Taxpayer protests the timing of the application of a refund against the assessment.

**III. Tax Administration—Penalty.**

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is an Indiana health care provider. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed use tax and assessed a negligence penalty for the tax years 2005, 2006, and 2007. The Department found that Taxpayer had purchased a variety of supplies without paying Indiana sales tax at the time of purchase or remitting use tax to the Department. Taxpayer protested the imposition of the tax on its "surgical supplies" and the imposition of penalties in general. An administrative hearing was held, and this Letter of Findings results.

**I. Sales and Use Tax— Imposition.**

**DISCUSSION**

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found that Taxpayer had purchased certain "surgical supplies" without paying sales tax at the time of purchase, and assessed used tax on the purchase.

IC § 6-2.5-3-2(a) provides, "An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." An exemption from the use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

Taxpayer asserts that its purchase of surgical "catheters, cannula, guide wires, needles, syringes, electrodes, and blades" are exempt from sales and use tax under the durable medical equipment exemption provided under IC § 6-2.5-5-18. Taxpayer supports its assertion by citing to [45 IAC 2.2-5-28\(g\)](#), which states, "The sale to the user of medical equipment, supplies, or devices prescribed by one licensed to issue such a prescription are exempt from sales and use tax." Taxpayer maintains that since the "surgical supplies" are used to correct a malfunction of the body and its use is prescribed by one licensed to issue such a prescription, the "surgical supplies" are exempt under [45 IAC 2.2-5-28\(g\)](#).

However, [45 IAC 2.2-5-28\(h\)](#) states, "The term 'medical equipment, supplies or devices,' as used in this paragraph, are those items, the use of which is directly required to correct or alleviate injury to malfunction of, or removal of a portion of the purchaser's body." (Emphasis added.) Moreover, the "user," referred to in [45 IAC 2.2-5-28\(g\)](#) is the patient-purchaser. Thus, unless the "surgical supplies" are sold to a patient under a prescription to correct a malfunction to the patient's body, [45 IAC 2.2-5-28\(g\)](#) does not apply. Here, the transaction in question, the "surgical supplies" purchased, were not a sale to a "user," but rather sales to a "practitioner." [45 IAC 2.2-5-36\(a\)](#) states, "The gross retail tax shall apply to the... purchase transactions made by licensed practitioners [to acquire]... surgical instruments, equipment and supplies." Since Taxpayer is a "practitioner" purchasing "surgical supplies," [45 IAC 2.2-5-36\(a\)\(3\)](#) applies signifying that the purchases of "surgical supplies" are subject to sales and use tax.

**FINDING**

Taxpayer's protest is respectfully denied.

**II. Tax Administration—Offset of Assessment.**

**DISCUSSION**

Taxpayer protests the timing of the application of its approved refund against its outstanding audit assessment. Taxpayer maintains that because the refund claim was determined outside the audit, additional

interest and penalties accrued on its audit assessment.

When the Department receives a claim for refund, the Department does not automatically refund the money. Pursuant to IC § 6-8.1-9-1(b), the Department considers the claim by evaluating the evidence provided with the claim, makes a determination on the claim, and mails a decision to the taxpayer. Once a determination has been made in which the Department finds that a refund is due, the money is offset against existing liabilities, credited to future periods, or refunded as provided in IC § 6-8.1-9-2. The statute contemplates this potential delay and provides the taxpayer's remedy when the Department acts in an untimely manner. In IC § 6-8.1-9-2(c), the Department is given ninety (90) days to credit or pay a refund from the date the refund claim is filed. If the Department fails to do so, the taxpayer's remedy is the payment of interest.

Taxpayer's assessment was determined in an audit report that was issued on December 2, 2008. Taxpayer's refund claim was not filed with the Department until December 19, 2008. After evaluating the refund claim, the Department granted the claim in part on March 13, 2009. During the audit process, Taxpayer questioned the auditor about refund claims being considered during the audit process. During the audit process, the auditor repeatedly informed Taxpayer that in order for the auditor to have the proper amount of time to evaluate a refund claim for the audit period that the Taxpayer would need to sign an extension form. Taxpayer repeatedly refused to sign the extension; therefore, the auditor advised Taxpayer that its refund claim would be evaluated separately from the audit. Taxpayer made a business decision to not sign the extension to allow the auditor enough time to include the evaluation of a refund claim in the audit. This decision resulted in any refund being approved occurring at a date later than the audit assessment was issued. The Department appropriately offset the assessment with the refund at the time the refund was actually determined to be due to Taxpayer, on March 13, 2009, as provided under IC § 6-8.1-9-2.

#### **FINDING**

Taxpayer's protest is respectfully denied.

#### **III. Tax Administration—Penalty.**

#### **DISCUSSION**

The Department issued proposed assessments and ten percent negligence penalties for the tax years in question. Taxpayer protests the imposition of the penalties. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides "if a person... incurs, upon examination by the department, a deficiency that is due to negligence... the person is subject to a penalty."

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2\(c\)](#), as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

Taxpayer has provided sufficient information to establish that its failure to pay the deficiency in this instance was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2\(c\)](#). While Taxpayer's current circumstances show that Taxpayer acted with reasonable cause, Taxpayer should be on notice that should these circumstances arise again, penalty waiver may not be warranted.

#### **FINDING**

Taxpayer's protest is sustained.

#### **CONCLUSION**

Taxpayer's protest to the imposition of tax is denied as discussed in Issue I. Taxpayer's protest to the timing of the application of the refund against the assessment is denied as discussed in Issue II. Taxpayer's protest to the imposition of penalty is sustained as discussed in Issue III.

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